FREE COPY

Office - Supreme Court, U. S.
FILED
NOV 12 1948
CHARLES ELMORE CROPLEY
CLERK

No. 354

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

R. W. CLAXTON, INC., *Petitioner,*

v.

BOYD F. SCHAFF, ET AL., *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Petition not printed

CAESAR L. AIELLO,
LLEWELLYN C. THOMAS,
901 Hibbs Building,
Washington 5, D. C.,
Attorneys for Respondents.

McKENNEY, FLANNERY & CRAIGHILL,
Washington, D. C.,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Facts and Proceedings Below	2
Summary of Argument	4
Argument	4
The Court of Appeals properly applied the law in effect at the time the first appeal was decided	4
Having been fully heard in both Courts below, Petitioners cannot claim any violation of due process	5
This case involves only matters of local tort liability in the District of Columbia which have been settled by its Courts of Appeal	7
The instructions of the trial court were correct, clear, and understandable. They incorporated the prayers submitted by appellant insofar as they correctly stated the law	12
Conclusion	14

TABLE OF CASES.

Bullock v. *Dahlstrom*, 46 A. 2d 370 (1946)	9
Cohen v. *Evening Star Newspaper Co.*, 72 App. D. C. 258, 113 F. 2d 523 (1940)	12
Gasque v. *Saidman*, 44 A. 2d 537 (1945)	10
Hellweg v. *Chesapeake & Potomac Telephone Co.*, 71 App. D. C. 346, 110 F. 2d 546 (1940)	12
Hiscox v. *Jackson*, 75 App. D. C. 293, 127 F. 2d 160 (1942)	11
Howard v. *Swagart*, 82 App. D. C. 147, 161 F. 2d 651 (1947)	10
Patterson v. *Alabama*, 294 U. S. 600 at 607 (1935)	4
Ross v. *Hartman*, 78 App. D. C. 217, 139 F. 2d 14 (1943)	3, 5, 7, 10
Ruppert v. *Ruppert*, 77 App. D. C. 65, 134 F. 2d 497 (1942)	5
Schaff v. *Claxton*, 79 App. D. C. 207, 144 F. 2d 532 (1944)	3, 9, 10
Squires v. *Brooks*, 44 App. D. C. 320 (1916)	2, 3, 7
Texas & Pacific R. R. Co. v. *Behymer*, 189 U. S. 468 (1903)	12
Vandenbark v. *Owen-Illinois Co.*, 311 U. S. 538 (1941)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 354.

R. W. CLAXTON, INC., *Petitioner,*

v.

BOYD F. SCHAFF, ET AL., *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR RESPONDENTS IN OPPOSITION.

This case involved only a question of tort liability local to the District of Columbia. On petition for rehearing in the Court of Appeals below and again in this Court, Petitioner has attempted to inject a constitutional issue by asserting denial of fair trial. Petitioner was not hampered in the presentation of its case in the Courts below and was fully heard not once but several times. Petitioner's argument on the merits simply ran counter to established recent precedents which the Court of Appeals declined to overrule.

FACTS AND PROCEEDINGS BELOW.

Petitioner, in the business of distributing seafoods (R. 38), employed George Glascoe to drive one of its trucks (R. 38). On the morning of May 7, 1941, Glascoe parked Petitioner's truck at the rear entrance of the Fat Boy Restaurant located on the corner of New York Avenue and Bladensburg Road, N. E., in Washington, D. C., while he went inside to make delivery of fish (R. 29, 30, 33, 34). The truck was left unattended, with the key in the ignition lock (R. 23, 31), in a parking space adjacent to the Restaurant (R. 35).

Luther Matthews, an employee of the Restaurant, took advantage of this opportunity to drive off in the truck, without Glascoe's knowledge or assent (R. 22, 23, 30, 32). As he was driving the truck along West Virginia Ave, he negligently pulled over to the left side of the avenue, attempted to pass other vehicles, and ran head-on into the car of Respondent Schaff, in which all five Respondents were riding to work (R. 13-21, 23). In the collision, Schaff's car was damaged, and all five Respondents were injured and later taken to Casualty Hospital (R. 12). Respondents brought this civil action against Petitioner, who admitted ownership of the truck (R. 4).

The case has been through two jury trials, at both of which the evidence established the foregoing facts. At the time of the first trial, the failure of Glascoe to remove the key, though it appeared in the testimony, was not urged as a ground of liability, because *Squires* v. *Brooks*, 44 App. D. C. 320 (1916), had held such an omission not to be a legal proximate cause of injuries resulting as they did in this instance.* The case was tried on other issues and a

---

* The point was discussed at the first pretrial conference, and Judge Pine sent for vol. 44 App. D. C. containing the report of the *Squires* case and showed it to counsel. Though not in the record of the conference, this informal discussion was mentioned in the arguments of both sides on the first appeal.

verdict was directed for Petitioner. Respondents noted an appeal.

Thereafter, the Court of Appeals in *Ross* v. *Hartman*, 78 App. D. C. 217, 139 F. 2d 14 (1943), *certiorari denied*, 321 U. S. 790 (1944), overruled *Squires* v. *Brooks* and held that the failure to remove an ignition key in violation of a traffic regulation, established both negligence and proximate cause as a matter of law. Accordingly, in their brief, on the first appeal, Respondents contended that the case should be re-tried in the light of the law established in the *Ross* case.

The Court of Appeals held (79 App. D. C. 207, 144 F. 2d 532) that the traffic regulation did not apply to the parking space beside the Restaurant, and for this reason, the liability was not established as a matter of law, but that:

> "• • • Under that ruling [the *Ross* Case], the evidence in the present case should have been submitted to the jury with instructions to find for the plaintiffs if they found that the defendant's driver was negligent in leaving the car unlocked and that this negligence was a proximate cause of the accident."

On remand, the pleadings were appropriately amended (R. 7, 9).

At the second trial, the evidence again showed the failure to remove the ignition key, the taking of the truck and the ensuing injuries to the Respondents. Petitioner was given the widest possible latitude in presenting its case and the issues were fully argued to court and to jury.

The jury returned a verdict in favor of Respondents, awarding $3,000 to Schaff for the loss of his car and personal injuries, $900 to Culliney, and $500 each to Chapman, Maher and Young for their personal injuries, a total of $5,400. Petitioner then noted the second appeal.

The Court of Appeals affirmed in a brief opinion (R. 81, 169 F. 2d 303). Petitioner now asks certiorari.

SUMMARY OF ARGUMENT.

The Court of Appeals properly applied the law in effect at the time the first appeal was decided. Having been fully heard in both Courts below, petitioners cannot claim any violation of due process. This case involves only matters of local tort liability in the District of Columbia which have been settled by its Courts of Appeal. The instructions of the trial court were correct, clear, and understandable. They incorporated the prayers submitted by appellant insofar as they correctly stated the law.

ARGUMENT.

The Court of Appeals properly applied the law in effect at the time the first appeal was decided.

With respect to supervening changes in the law, the Court said in *Patterson* v. *Alabama,* 294 U. S. 600 at 607 (1935):

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act. We have said that to do this is not to review, in any proper sense of the term, the decision of the state court upon a non-federal question, but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case. *Gulf, C. & S. F. Ry. Co.* v. *Dennis,* 224 U. S. 503, 507; *Watts, Watts & Co.* v. *Unione Austriaca,* 248 U. S. 9, 21; *Dorchey* v. *Kansas,* 264 U. S. 286, 289; *Missouri ex rel. Wabash Ry. Co.* v. *Public Service Comm'n,* 273 U. S. 126, 131."

The same principle was applied by this Court in *Vandenbark* v. *Owen-Illinois Co.*, 311 U. S. 538 (1941) and by the Court below in *Ruppert* v. *Ruppert*, 77 App. D. C. 65, 134 F. 2d 497 (1942).* In both of these cases a decision overruling former cases in point appeared on the scene while an appeal was pending.

Quite properly therefore, the Court of Appeals reversed on the first appeal in this case on the strength of *Ross* v. *Hartman*, 78 App. D. C. 217, 139 F. 2d 14 (1943), *certiorari denied*, 321 U. S. 790 (1944), citing both the *Patterson* and *Ruppert* cases in support. 79 App. D. C. at 208, 144 F. 2d at 533.

Having been fully heard in both Courts below, petitioners cannot claim any violation of due process.

Ross v. *Hartman*, 78 App. D. C. 217, 139 F. 2d 14 (1943), applied a rule of tort liability to the injuries which one Willie Ross sustained on October 19, 1940. On the first appeal in this case, Respondents contended that the same rule should apply to injuries which they sustained on May 17, 1941, under similar circumstances. Petitioner on that appeal had a full and complete opportunity to argue the point in any manner its counsel saw fit, and its brief contained several pages addressed to the point.

The Court of Appeals took the *Ross* case into account and held that liability was a jury question. 79 App. D. C. 207, 144 F. 2d 532. The Court's meaning was crystal clear. Whether the conduct of the driver employed by Petitioner squared with the conduct of the "reasonably prudent man" and was the legal cause of the injuries was held to be a matter upon which reasonable minds might differ and therefore had to be decided by a jury and not by the Court as in the *Ross* case.

---

* The jurisdictional provisions for the Court of Appeals (D. C. Code, 1940, § 17-101) allow that Court to "review such order, judgment, or decree, and affirm, reverse, or modify the same as shall be just . . ."

Petitioner had full opportunity to petition for rehearing, but did not do so. Petitioner had full opportunity to petition for certiorari, but did not do so.

The case was retried in the District Court and the evidence was substantially the same. Counsel for Petitioner were heard four times during the trial, twice by the Judge on motions for directed verdict, (Orig. Tr.* 20-21, R. 68) twice by the jury on opening and closing arguments (Orig. Tr. 47, 119). After the verdict, Petitioner filed and the Judge considered a written motion for judgment notwithstanding verdict or for new trial (R. 77-79), to which was annexed a lengthy memorandum.

On the second appeal, counsel for Petitioner filed a 50-page brief, and were heard in opening and closing oral arguments. They obtained leave to file and did file a supplemental memorandum. After the adverse decision, they filed a petition for rehearing (R. 84-94), and then for the first time complained of denial of fair hearing, using the following somewhat extravagant phrases:

> "without ever having had an opportunity to have any judge or any court give due and proper consideration to its contentions" (R. 89)
>
> "hardly seems just or fair" (R. 89)
>
> "constitutes a denial of due process of law" (R. 89)
>
> "clearly erroneous" (R. 92)
>
> "follow blindly an earlier adjudication" (R. 93)
>
> "manifest injustice" (R. 93)
>
> "denied a fair hearing on the substantial legal questions presented in and by this appeal" (R. 93)
>
> "elements of reluctance on the part of the justices who heard this appeal to give free and unfettered consideration to the substantial legal questions presented" (R. 94)

---

* Orig. Tr. refers to pages of the original transcript on file in this Court, as distinguished from the printed record which has many omissions.

It can hardly be said that Petitioner has been treated unfairly or denied due process, simply because its contentions have not prevailed. As the opinions of the majority and minority in the Court of Appeals both state on the second appeal, the law had been established. There was no reason for an extended discussion by the Court on matters covered by previous opinions.

This case involves only matters of local tort liability in the District of Columbia which have been settled by its Courts of Appeal.

Squires v. *Brooks*, 44 App. D. C. 320, was decided in 1916. In that case the owner of an automobile left it standing on the street, unlocked, in violation of a police regulation, an unknown person appropriated it to his own use and "while driving at a reckless and unlawful rate of speed, collided with plaintiff's automobile, inflicting the damage for which an award is sought." The injured person sued the owner. A demurrer to the declaration was sustained and the Court of Appeals affirmed.

Ross v. *Hartman*, 78 App. D. C. 217, 139 F. 2d 14, was decided in 1943, *certiorari denied*, 321 U. S. 790 (1944). A driver employed by the owner of a truck left it standing in a public alley outside a garage, unlocked, in violation of a similar traffic regulation.* Within two hours an unknown person drove the truck away and negligently ran over the appellant. The injured person brought suit against the owner and a verdict was directed for the owner on the au-

---

*"Locks on Motor Vehicles. Every motor vehicle shall be equipped with a lock suitable to lock the starting lever, throttle, or switch, or gear-shift lever, by which the vehicle is set in motion, and no person shall allow any motor vehicle operated by him to stand or remain unattended on any street or in any public place without first having locked the lever, throttle, or switch by which said motor vehicle may be set in motion." Traffic and Motor Vehicle Regulations for the District of Columbia, Section 58.

thority of *Squires* v. *Brooks*. The Court of Appeals, reversing, said:

> "• • • We cannot reconcile that decision with facts which have become clearer and principles which have become better established than they were in 1916, and we think it should be overruled.
>
> "Everyone knows now that children and thieves frequently cause harm by tampering with unlocked cars. The danger that they will do so on a particular occasion may be slight or great. *In the absence of an ordinance, therefore, leaving a car unlocked might not be negligent in some circumstances, although in other circumstances it might be both negligent and a legal or 'proximate' cause of a resulting accident.*•
>
> "But the existence of an ordinance changes the situation. • • • Violation of an ordinance intended to promote safety is negligence. If by creating the hazard which the ordinance was intended to avoid it brings about the harm which the ordinance was intended to prevent, it is a legal cause of the harm. This comes only to saying that in such circumstances *the law has no reason to ignore and does not ignore the causal relation which obviously exists in fact*. The law has excellent reason to recognize it, since it is the very relation which the makers of the ordinances anticipated. • • •"
>
> "• • • This negligence created the hazard and thereby brought about the harm which the ordinance was intended to prevent. It was therefore a legal or 'proximate' cause of the harm. Both negligence and causation are too clear in this case, we think, for submission to a jury.
>
> "The fact that the intermeddler's conduct was itself a proximate cause of the harm, and was probably criminal, is immaterial. • • • the conduct of the defendant or his agent was negligent precisely because it created a risk that a third person would act improperly. In such circumstances the fact that a third person does act improperly is not an intelligible reason for excusing the defendant."

• Emphasis throughout this brief supplied.

> "* * * Appellee's agent created a risk which was both obvious and prohibited. Since appellee was responsible for the risk, it is fairer to hold him responsible for the harm than to deny a remedy to the innocent victim."

Schaff v. *Claxton*, 79 App. D. C. 207, 144 F. 2d 532, the first appeal in this case, was decided in 1944. A driver employed by the owner of a truck left it standing in a parking space adjacent to a restaurant. An employee of the restaurant, without the assent of this driver, drove the truck away and negligently ran into and injured appellees. Appellees sued the owner. The Court of Appeals, remanding the case, said:

> "* * * Under that ruling [the *Ross* case], the evidence in the present case should have been submitted to the jury with instructions to find for the plaintiffs if they found that the defendant's driver was negligent in leaving the car unlocked and that this negligence was a proximate cause of the accident."

Bullock v. *Dahlstrom*, 46 A. 2d 370, was decided by the Municipal Court of Appeals for the District of Columbia in 1946. A taxi driver left his cab with ignition key in the lock and with a patron in the rear seat while he stepped into a store. The patron drove away in the cab and negligently ran into plaintiff's car. Suit was brought against the taxi driver and resulted in a finding for plaintiff. There was some doubt whether the traffic regulation had been violated, but the court, affirming, said:

> "In the instant case the trial court sat without a jury; and, under the ruling in the Schaff case, we think it was for him to determine whether, under the particular circumstances, the defendant was negligent in leaving the taxicab with the passenger in it and the key in the ignition, and, if so, whether such negligence was a proximate cause of the collision. The trial judge having answered both of these questions adversely to the defendant, we cannot disturb the judgment."

Cf. *Gasque* v. *Saidman*, 44 A. 2d 537, at page 539 (Mun. App. 1945).

The doctrine established in the *Ross* and *Schaff* cases, supra, was reaffirmed in the opinion rendered in *Howard* v. *Swagart*, 82 App. D. C. 147, 161 F. 2d 651 (1947).

Petitioner contended that there should have been a directed verdict in its favor, that no reasonable person could possibly conclude that it was negligence to leave the truck unlocked at the Fat Boy Restaurant, or that the collision was proximately caused by this act. This contention simply ignored and sought to have the Court of Appeals repudiate, what was said in the comparatively recent opinions above cited, including *Schaff* v. *Claxton*, the former appeal in this very case. The evidence of the circumstances under which Glascoe left the truck unlocked at the Fat Boy Restaurant, which on the former appeal was found sufficient for jury determination, did not vary substantially from one trial to the other. In fact, the evidence at the second trial, if anything, established the negligence of Glascoe more persuasively. The restaurant lies between New York Avenue and Bladensburg Road. There is a driveway and parking space all around the building, and the position of the truck was described as being "50 to 75 feet" from the street (R. 24, 28, 30, 34, 35, 36, 47, 57, 59). In other words, although on private property, it was almost as open to the public as the street itself. The jury had before it photographs of the exact location where the truck was parked and diagrams were drawn on a blackboard (R. 36-37, 35).

Had the truck been parked only a short distance away on the adjacent public street, the traffic regulation would have applied. In such case, appellee would have been entitled to a directed verdict on the authority of *Ross* v. *Hartman*.

> "* * * To pass from a directed verdict for plaintiff, through the area of jury questions, to a directed verdict for defendant, requires very strong, compelling evidence on behalf of defendant. It requires evidence which destroys all inferences and presumptions sup-

porting plaintiff and which raises no doubts against defendant. * * *"

Hiscox v. *Jackson*, 75 App. D. C. 293, 294; 127 F. 2nd 160, 161 (1942).

The decision on the first appeal placed the issues in this case in the "area of jury questions." The issues were submitted to the jury, and the jury rendered its verdict. Petitioner, nevertheless, appeared to contend in the face of that decision that the case has passed "through the area of jury questions" to a case for directed verdict.

At the second trial a parade of witnesses marched to the stand to state that they, too, leave their keys in the ignition lock when they deliver goods to the Fat Boy Restaurant. There was the bread man (R. 41, 46), the linen man (R. 46, 49), the Royal Crown Cola man (R. 49, 51), the beer man (R. 51, 52), the food specialty man (R. 52, 54), the grocery man (R. 54, 56), the ice cream man (R. 56, 58), and the coffee man (R. 58, 59). Two of these drivers, in describing the manner of making deliveries at the Fat Boy Restaurant, volunteered the information that they left the key in the ignition lock as a customary procedure (R. 43, 50). The others had to be asked specifically on this point. On cross examination, nearly all admitted that the failure to remove the key was a matter of convenience and haste so that they could get on with their deliveries (R. 49, 51, 54, 56, 58, 59). One driver expressed a belief that it was safe on private property, but admitted that he could be wrong (R. 46). Another specifically stated that he was in a hurry and had no thought of safety measures (R. 49).

It is not surprising that this display of solidarity did not impress the jurors. The nature of this evidence was, aside from the question of credibility, not such as to remove the case from the "area of jury questions." In any automobile negligence case it would be possible to present the testimony of countless witnesses that they had violated the particular standard of due care involved, for instance that they had driven too fast or even customarily did so. The

difficulty with this approach is that *customary precautions* do not establish the standard of due care. *Hellweg* v. *Chesapeake & Potomac Telephone Co.*, 71 App. D. C. 346, 110 F. 2d 546 (1940), which relied on *Texas & Pac. R. Co.* v. *Behymer*, 189 U. S. 468, 470 (1903).

With the local law so positively established by recent decisions, Petitioner goes far afield in citing cases from other jurisdictions.

The instructions of the trial court were correct, clear, and understandable. They incorporated the prayers submitted by appellant insofar as they correctly stated the law.

In the alternative, Petitioner contended that the charge to the jury was incorrect and that the case should have been sent back for a third trial. It is the practice of Judge McGuire, and he so informed counsel, not to grant "prayers" or requests for instructions in the exact form presented, but to incorporate the request, insofar as they correctly state the law, in their proper context in his own charge to the jury.

> "A party has no vested interest in any particular form of instruction. This is true, even though the proffered prayer may be unobjectionable in itself, standing alone, as a statement of law. What the language of the instructions shall be is for the trial judge to determine. If, on examination of the entire charge, it appears that the jury has been fairly and adequately instructed, the requirements of the law are satisfied."
>
> *Cohen* v. *Evening Star Newspaper Co.*, 72 App. D. C. 258, 113 F. 2d 523 (1940).

The colloquy in the record (R. 67-68) indicates that there was some question about the requests made by appellant (R. 75-76), but concludes with the statement, "I will grant that in substance." In making his charge to the jury,

Judge McGuire said, among other things, the following (R. 70-71):

> " * * * Five men on their way to work were injured as the result of the collision of two motor vehicles. One of the vehicles was stolen and being operated as a stolen vehicle upon the highway. **The issue that you** have to decide is whether or not leaving a truck unattended with an ignition key in the vehicle is negligence, and then the plaintiffs must go forward and prove that such negligence, if you should conclude that it was negligence, was the proximate cause of the injury.
>
> "Now, what is negligence? * * * It is the failure to use ordinary care in the management of one's property or person, living as we do in a highly integrated and complex society.
>
> * * * * * * * * * *
>
> "Now, ordinary care, as I have indicated, is that which persons of ordinary prudence exercise in the management of their own person and property in order to avoid injury to others. *Inasmuch as the amount of caution used by the ordinary prudent person varies in direct proportion to the danger known to be involved in an undertaking, it follows that in the exercise of ordinary care the amount of caution required by law varies* in accordance with what? With the nature of the act and the surrounding circumstances.
>
> *"Now, leaving a car unlocked under some circumstances might not be negligence, yet, it may well be negligence in another,* and if as the result and in immediate sequence some other event occurs which would not have occurred if there was no negligence, one might be responsible even though his negligence comes first in point of time."

The jury had just heard two days of testimony and the opening and concluding arguments of counsel concerning the omission of Glascoe to remove his keys, a fact which stands undisputed and uncontradicted in the record. Much of the evidence was of the hurried actions of other drivers in similarly risking theft of their vehicles by leaving their keys in ignition locks. Following upon all of this, the charge

given by Judge McGuire in the context of the trial clearly conveyed the idea contained in the requests submitted for appellant (R. 75-76), that the jury should consider, in the light of the circumstances, the reasonable anticipation of the theft which actually did occur.

Prayers 5 and 6 (R. 75-76) were somewhat technical in attempting to inject the element of the reasonable anticipation of harm into the question of proximate cause. Even if appellant were correct in the abstract statement of the law, the point is academic. The jurors were instructed to consider the "danger known to be involved", and the verdict necessarily shows that they considered the danger of theft such that a prudent person would have removed the ignition key. It would have been only confusing and redundant to say, "First you must consider reasonable anticipation of theft in connection with negligence, and if you find negligence you must again consider reasonable anticipation of theft in connection with proximate cause." The problem would be the same in both instances. The prayers of appellant were hence fairly before the jury, and there can be no complaint on this score.

CONCLUSION.

This case involved simply a question of local law in the District of Columbia, decided by the Court of Appeals in accord with applicable precedents. Petitioner was fully heard and given all possible scope in the presentation of its case. Accordingly it is respectfully submitted that the petition for certiorari in this case should be denied.

CAESAR L. AIELLO,
LLEWELLYN C. THOMAS,
901 Hibbs Building,
Washington 5, D. C.,
Attorneys for Respondents.

McKENNEY, FLANNERY & CRAIGHILL,
Washington, D. C.,
Of Counsel.